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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1274

DELTA AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD,
CONTINENTAL AIR LINES, INC., ET AL., *Respondents*

BRIEF FOR RESPONDENT CONTINENTAL AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Continental Air Lines, Inc. ("Continental") submits this brief in opposition to the petition of Delta Air Lines, Inc. ("Delta") for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit for review of that court's decision and judgment in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* Case No. 73-1377, entered on October 23, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which Delta seeks, issued in the third case in which that court has heard Delta's *Ashbacker* argument in connection with the route here at issue.

In *National Airlines, Inc.* v. *CAB,* 129 U.S. App. D.C. 180, 392 F.2d 504 (1968), the court dismissed Delta's appeal which sought review of the Board's decision declining to expand the proceeding to include numerous secondary markets.

In *Continental Air Lines, Inc.* v. *CAB,* 143 U.S. App. D.C. 330, 443 F.2d 745 (1971), the court set aside the Board's award of the Houston-Miami route to Delta and remanded the case for further consideration.

No party sought review by this Court of either of the prior decisions of the Court of Appeals in this proceeding.

QUESTION PRESENTED

This case does not present the question of whether the right to a fair comparative hearing, mandated in *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327 (1945), applies in airline route cases.

This case presents the narrower question as to whether the Board's award to Continental of a new route between Houston and Miami, denied to Delta a fair comparative hearing, where—(1) the proceeding was limited to consideration of competitive service between specified pairs of cities; (2) comparative hearing was afforded to all competing applicants for the route here at issue; (3) the Board's "choice of Continental for a Houston-Miami award is predicated primarily on the fact that it will bring greater service benefits than any other applicant to the primary market and offer superior beyond-area advantages as well"; and (4) Delta was afforded an opportunity in the hearing to show that an award to Continental and the grant of its excluded application for other routes were mutually exclusive economically, and failed to do so.

STATEMENT

A concise statement of the case, containing the facts material to the consideration of the questions raised by Delta, is contained in Part II of the opinion of the Court of Appeals. Appendix A, pp. 6-13.[1] The statement of the case offered by petitioner is misleading in a number of respects which will be discussed in the argument. For the convenience of the Court, Continental will here set out a brief summary of the history of this proceeding.

This case arose out of a Civil Aeronautics Board route proceeding begun in 1967, involving the need for additional nonstop service in 18 major markets lying across the southern portion of the United States. *Southern Tier Competitive Nonstop Investigation,* Docket 18257.

Delta and National Air Lines, Inc. (National), the incumbent monopolists in most of these markets, moved to expand the proceeding to include numerous secondary markets. The Board refused to do so, holding that such an expansion would unduly complicate the proceeding. The carriers appealed the Board's decision to the United States Court of Appeals for the District of Columbia, claiming a denial of the right to a comparative hearing mandated in *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327 (1945). The court dismissed the appeal for lack of jurisdiction, observing, however, that the *Ashbacker* claim appeared to be without substance. *National Airlines, Inc.* v. *CAB,* 129 U.S. App. D.C. 180, 186, 392 F.2d 504, 510 (1968).

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[1] "Appendix" refers to the Appendix to Petition for Writ of Certiorari submitted in a separate accompanying volume by petitioner. "J.A." and "S.J.A." refer to the Joint Appendix and Supplemental Joint Appendix filed in the Court of Appeals.

After a full administrative hearing, Chief Administrative Judge Wiser selected Continental to compete with National in the Houston-Miami market, based on his finding that Continental "can give the best public service in the market." Initial Decision, February 28, 1969, p. 53; S.J.A. 83. He rejected Delta's *Ashbacker* argument. *Id.* at 58-61; S.J.A. 88-91.

The Board, however, selected Delta based on "considerations of the overall balance of awards" in this and other markets. Order 69-7-135, July 24, 1969, p. 45; S.J.A. 214.

Continental sought review by the Court of Appeals for the District of Columbia Circuit. On February 12, 1971, that court set aside the award to Delta and remanded the case to the Board for consideration of "the balance of the factors bearing directly upon the route in issue", pointing out the Board's failure to fully consider the superior public benefits which would result from Continental's selection. *Continental Air Lines, Inc.* v. *CAB,* 143 U.S. App. D.C. 330, 343, 443 F.2d 745, 758 (1971).

On March 5, 1971, the Board vacated Delta's award but granted Delta temporary authority by exemption to continue operating "until sixty days after final determination by the Board of this remanded proceeding." Order 71-3-34, p. 7; S.J.A. 461.

After a full rehearing, Administrative Law Judge Dapper selected Continental, considering all of the factors bearing directly on the route in issue and finding that Continental would provide the greatest public benefits in terms of greater frequency of service in the Houston-Miami market, lower fares to Houston-Miami travellers, and new single-plane service between Miami

and points west of Houston. Initial Decision, July 21, 1972, pp. 20-58; S.J.A. 498-536. Judge Dapper rejected Delta's *Ashbacker* argument because Delta failed to make a factual showing that an award to Continental and the authority sought in Delta's excluded application were mutually exclusive. *Id.* at 63-65; S.J.A. 541-43.

The Board affirmed Judge Dapper's selection of Continental, agreeing that its selection would provide the greatest public service benefits. Order 73-2-89, February 23, 1973; S.J.A. 560. The Board also considered and rejected Delta's *Ashbacker* argument. *Id.* at pp. 13-16; S.J.A. 573-76.

Delta sought reconsideration based on its *Ashbacker* argument, which the Board again considered and rejected. Order 73-5-22, May 4, 1973, pp. 2-10; S.J.A. 688-96.[2]

Delta and other disappointed applicants then sought a stay of the Board's order, which was to become effective on April 24, 1973, pending its appeal to the United States Court of Appeals for the District of Columbia Circuit. The Board denied this request. Order 73-4-24, April 4, 1973; S.J.A. 654.

Delta and these other carriers next sought a stay from the Court of Appeals. That court on April 25, 1973, granted a stay, but without opinion. As a result of the stay, the Board extended Delta's exemption authority "until the United States Court of Appeals for the Dis-

[2] In doing so, the Board stated that it selected Continental because it would provide "a greater volume of service in the primary market, a broader range of services, and more first single-plane and overall single-carrier benefits in beyond-markets. These factors were material." Order 73-5-22, p. 11; S.J.A. 697.

trict of Columbia Circuit issues its mandate on the merits." Order 73-7-106, July 23, 1973.

On October 23, 1973, the court issued its opinion, unanimously denying the petitions for review and affirming the Board's order. On November 6, 1973, Delta petitioned for rehearing and suggested a rehearing in banc, based upon its *Ashbacker* contention. On November 20, 1973, the court denied Delta's petition, noting as to suggestion for rehearing in banc that "no Judge has requested a vote thereon."

On November 21, 1973, Delta sought a stay of the court's mandate for a period of thirty (30) days pending the filing of a petition for writ of certiorari based solely on its *Ashbacker* argument. Continental and the Government opposed grant of this stay.

On December 7, 1973, the court denied Delta's motion, but withheld issuance of its mandate until December 14, 1973, to give Delta time to seek a stay from the Supreme Court.

Delta's application to this Court for a stay of the mandate of the Court of Appeals was filed on December 10, 1973, presented to Mr. Chief Justice Burger, and denied on December 13, 1973.

On December 13, 1973, the Board extended Delta's exemption through January 31, 1974. Order 73-12-55. On February 1, 1974, Delta terminated its two daily round-trip flights with DC-9 aircraft, and Continental commenced service between Houston and Miami with three daily flights in each direction with larger Boeing 720-B aircraft (with a fourth round-trip flight to be added as soon as fuel supplies permit), and introduced the lower Economy Fare for the first time in the Houston-Miami market.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There are no special or important reasons for this Court to review the instant case on writ of certiorari and the writ should not be granted. The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter, nor has the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

The petitioner appears to infer that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court by suggesting that the first question presented is whether the *Ashbacker* doctrine of fair comparative hearing is applicable to airline route cases (Petition, p. 2), and that the decision of the Court of Appeals "has cast serious doubt on the validity and applicability of that doctrine to airline cases" (Petition, p. 12).

It is of course well settled that the applicant for an airline route is as much entitled to a fair comparative hearing on his application as is an applicant for a communications license. *Western Air Lines, Inc.* v. *Civil Aeronautics Board,* 184 F.2d 545 (9th Cir. 1950); *Northwest Airlines, Inc.* v. *Civil Aeronautics Board,* 90 U.S. App. D.C. 158, 194 F.2d 339 (1952); *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 97 U.S. App. D.C. 46, 228 F.2d 17 (1955); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 100 U.S. App. D.C. 184, 243 F.2d 607 (1957); *Frontier Airlines, Inc.* v. *Civil Aeronautics Board,* 104 U.S. App. D.C. 78, 259 F.2d 808 (1958); *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 107 U.S. App. D.C. 174, 275 F.2d 632 (1959), *cert. denied,* 362 U.S. 969 (1960) (*"Second Delta"*); *National Airlines, Inc.* v. *Civil Aeronautics Board,* 129

U.S. App. D.C. 180, 392 F.2d 504 (1968). There is no reason for this Court to "assess" the "current vitality" of the *Ashbacker* doctrine (Petition, p. 12), because there is no doubt as to its validity.

The only offense which Delta asserts was committed by the Court of Appeals is that the Court failed "to reconcile or even cite the leading decision in which *Ashbacker* rights were held violated . . ."—i.e., its own earlier decision in *Second Delta.* Petition, p. 12. What the court below did instead was to cite the precedents applicable to the factual situation here presented, *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board, supra,* and its prior decision in this same proceeding, *National Airlines, Inc.* v. *Civil Aeronautics Board, supra.* The court did not again distinguish *Second Delta* from the case at bar because it already had done so in its decision in *National.* The court's refusal to belabor inapplicable precedents is hardly ground for certiorari.

Petitioner also suggests as a reason for the grant of a writ that the court below has sanctioned certain administrative procedures of the Civil Aeronautics Board, e.g., the Board's practice to "initiate new route proceedings *sua sponte* and [predetermine] . . . what routes may be contended for therein" (Petition, p. 12), or dismiss applications as stale (Petition, p. 18). To the extent that the first issue was raised below, it was not raised in the instant case but in *National Airlines, Inc.* v. *Civil Aeronautics Board, supra,* in 1971, and no review sought in this Court. The second issue is raised by Delta for the first time in its petition and has no real relevance in any event, since in the hearing Delta was permitted to offer evidence on the issue of mutual exclusivity even though it had no application pending.

In short, there is no reason for the Court to review the proper application of a well established rule of law to the facts in this particular route case.

ARGUMENT

I. There Was a Sound Basis for Continental's Selection for the Houston-Miami Route.

All that has happened in this case is that the Board has awarded the Houston-Miami route to the carrier whose selection insures the greatest benefits to the public. Setting aside Delta's rigmarole about pairs of points, pieces of applications, and "area considerations"—what both the administrative law judges and finally the Board did in this case was to consider each applicant in terms of traditional carrier-selection factors, and choose the carrier who would provide the greatest frequency of nonstop flights in the primary market, the lowest fares, and the best connecting service to cities west of Houston.

There has never been any doubt that Continental's selection for this route would result in the greatest public benefits, not just because Continental is an aggressive competitor, which it is, or an advocate of lower fares, which it is, but because its route structure permits it to offer the greatest frequency of service in the market at issue. Following the original hearing, the Administrative Law Judge found that the principal deficiency in the Houston-Miami market was the lack of nonstop service, with the incumbent carrier, National, providing only a single daily nonstop flight in one direction and serving the market principally with one-stop and multi-stop service. Initial Decision, February 28, 1969, p. 29; S.J.A. 22. He selected Con-

tinental based on the fact that it "can give the best public service in this market." *Id.* at 53; S.J.A. 83.

The Board agreed with Judge Wiser that National "has not been diligent in developing the service in this market," having provided "too little nonstop service." Order 69-7-135, July 24, 1969, p. 43; S.J.A. 212. However, the Board selected Delta based on the conclusory statement that "the balance of other factors [between Continental and Delta] in the Houston-Miami market are quite close," and the route should be awarded to Delta on the basis of "considerations of the overall balance of awards. . . ." *Id.* at 45; S.J.A. 214.

After seeking and being denied reconsideration by the Board, Continental sought review by the Court of Appeals for the District of Columbia Circuit of both the Houston-Miami and Dallas-Phoenix awards to Delta. The Houston-Miami and Dallas-Phoenix markets were virtually identical. Both markets were about the same distance and size. Both were served by monopolists which provided insufficient nonstop service. In Houston-Miami, Continental was able to provide the highest level of nonstop service and new single-carrier service between Miami and points west of Houston. Continental did not serve Miami; Delta served both cities. In Dallas-Phoenix, Delta was able to provide the highest level of nonstop service and new single-carrier service between Phoenix and points east of Dallas. Delta did not serve Phoenix; Continental served both cities. The Board, however, selected Delta for both markets, without explanation of the obvious inconsistency.

On February 12, 1971, the Court of Appeals upheld the Board's decision awarding the Dallas-Phoenix route to Delta on the basis of its ability to provide the

greatest frequency of service in the market at issue and new single-carrier service between Phoenix and cities beyond Dallas. The court set aside the Board's order awarding the Houston-Miami route to Delta, and remanded that part of the case to the Board to consider "the balance of factors bearing directly upon the route in issue." *Continental Air Lines, Inc.* v. *Civil Aeronautics Board,* 143 U.S. App. D.C. 330, 343, 443 F.2d 745, 758 (1971). While the court was critical of several aspects of the Board's decision, including the inconsistent manner in which the two awards had been made, it recited the fare and service benefits which would result from Continental's selection and observed, "Had all or some of these been expressly dealt with, it is at least possible that the Board might not have found the balance between Continental and Delta to be so closely struck." 143 U.S. App. D.C. at 342, 443 F.2d at 757.

In remanding the case, the court gave the Board the choice of proceeding "with or without the taking of further evidence." The Board elected to order a full rehearing of the Houston-Miami case. Order 71-11-17, p. 2; S.J.A. 464. After a full rehearing, Administrative Law Judge Dapper again found a need for competitive service in the market, based on its size, growth rate, and the inadequate level of National's nonstop service, even with the limited spur of Delta's competition which the Board permitted it to continue to provide under an exemption. Initial Decision, July 21, 1972, pp. 17-20; S.J.A. 495-98.[3] Following the mandate of the Court of Appeals to consider "the balance of

[3] Judge Dapper's Initial Decision on rehearing is hereafter cited as "I.D."

factors bearing directly upon the route at issue," Judge Dapper analyzed the proposals and arguments of each applicant with respect to each of the ten carrier-selection factors. I.D., pp. 20-57; S.J.A. 498-535.[4] He concluded:

> "The selection of carrier factors, viewed in the aggregate, clearly favor Continental. That carrier has a distinct and significant advantage in terms of beyond-area benefits, frequencies to be operated over the segment, and the proposed economy fare. The only factors which militate against Continental's selection are its lack of identity in Miami and the diversion from other carriers which its proposal will cause. These negative considerations have been revealed on analysis herein to be of lesser significance than the compelling factors favoring Continental's selection." I.D., p. 58; S.J.A. 536.

The Board elected to review Judge Dapper's decision, *sua sponte*. After receiving briefs and hearing oral argument, the Board adopted Judge Dapper's Initial Decision, stating at the outset of its opinion, "we adopt his findings and conclusions as our own." Order 73-2-89, p. 1; S.J.A. 561; Appendix C, p. 25. The Board, like Judge Dapper, found that competitive service was required "to afford Houston-Miami passengers a complete, well balanced pattern of nonstop

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[4] Specifically, he considered: (1) route integration as evidenced by the ability to convenience beyond-segment traffic; (2) frequencies to be operated over the segment in issue; (3) type of equipment and in-flight services; (4) fares; (5) identity at the Houston and Miami stations; (6) historic participation in the traffic; (7) efforts to develop and promote the market in question; (8) route strengthening; (9) diversion from other carriers; and (10) profitability of the route.

schedules. . . ." *Id.* at 3; S.J.A. 563; Appendix C, p. 26. The Board affirmed Judge Dapper's selection of Continental, noting that its choice, "like Judge Dapper's, turns on the traditional carrier selection factors directly applicable to the market at issue . . . ." *Id.* at 7; S.J.A. 567; Appendix C, p. 30. The Board summarized the basis for its decision as follows:

> "Our choice of Continental for a Houston-Miami award is predicated primarily on the fact that it will bring greater service benefits than any other applicant to the primary market and offer superior beyond area advantages as well. At the same time, we believe that Continental's proposal will not seriously harm any other carrier." *Id.* at 5; S.J.A. 565; Appendix C, p. 28.

II. The Fallacy of Delta's Ashbacker Argument.

Delta's *Ashbacker* argument is based on an effort to equate the Board's action in the present case with that condemned by the court in Part I of *Second Delta.* In that case the court held the *Ashbacker* rule to be violated when the Board chose TWA for a route between St. Louis and the Southeast *solely* for the reason that the award would enable TWA to provide transcontinental service between Florida and California, at a time when the California-Florida route was the subject of a pending investigation. The court stated: "The Board made clear that it selected TWA as the awardee of the new route because this selection would provide for the first time single-carrier, single-plane service between the Florida coast and the California coast." 107 U.S. App. D.C. at 178, 275 F.2d at 636. The court concluded that the Board "cannot hear an area case and, without more, make a transcontinental award,"

and "thus ignore pending applications for a transcontinental route certificate, if those applications are mutually exclusive. . . ." 107 U.S. App. D.C. at 181, 275 F.2d at 639.

In its effort to find in this case the "mirror image" of *Second Delta*,[5] Delta's brief in the Court of Appeals repeatedly asserted that Continental's selection by Judge Dapper and the Board was based *solely* on beyond-area service benefits. See, e.g., Delta's brief to the Court of Appeals, pp. 18, 21, 32, 34. As documented in the preceding section of this argument, Delta's contention is an obvious distortion of the decision of the Board and its administrative law judge.

Having urged that the court heed a precedent which is obviously inapplicable to the present case, Delta asserts that the court's failure to discuss *Second Delta* "amounted to a *sub silentio* overruling thereof." Petition, p. 12. This assertion is absurd. The court made clear that the two cases were not parallel. The court stated, "In sum, Delta's *Ashbacker* claim rests on the fallacy that Continental was selected for its ability to serve the needs of the excluded cities whereas it was actually selected upon evaluation of the Houston-Miami market, its need for service, and the kind of service in that market proffered by Continental, including the service made possible by Continental's backup support . . . ." Appendix A, p. 13.

In its present petition, Delta apparently abandons its prior effort to convince the reviewing courts that Continental was selected solely on the basis of the benefits it could provide to cities beyond Houston, and

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[5] Delta's brief in the Court of Appeals, p. 31.

now appears to argue that any reference to or reliance upon beyond-area benefits fatally poisons the Board's decision. Such a rule would obviously affront the basic public-interest standards of the Act. Fortunately such a rule has never been declared in *Second Delta* or in any other court decision.

The Board clearly is not prohibited from considering beyond-segment traffic benefits in selecting a carrier to serve a route. As the Court of Appeals observed in *Frontier Airlines, Inc.* v. *CAB,* 104 U.S. App. D.C. 78, 80, 259 F.2d 808, 810 (1958), "Without elaborating these contentions it is sufficient to say that we think the needs of beyond-area traffic may in many factual situations be a proper concern in the problems of establishing new air routes. In many situations we do not see how it could be otherwise."

Subsequently, in *Second Delta,* the very case on which Delta relies, the court observed that consideration of beyond-area traffic, to the extent that such traffic support enables the carrier to mount a higher level of service within the primary market at issue, is quite different from basing an award solely on the needs of the beyond-segment traffic. Specifically, the court stated: "[Beyond-area] traffic is certainly pertinent to the selection of a carrier to perform intra-area services found necessary because of service deficiencies within the area; such traffic may well, as the Board found, be used to provide the base for proper traffic development within the area." 107 U.S. App. D.C. at 184, 275 F.2d at 642.

In sum, the Board is not precluded from considering any aspect of the public interest in selecting a carrier to serve a particular route. In this case the court thus

applied these established principles to the facts before it. It stated:

> "It is true that the Board did give consideration to traffic generated at the excluded points when it came to measure the quantity of traffic between Houston and Miami—for the purpose of appraising the feasibility and realism in Continental's proffer as to Houston-Miami service, and of appraising the quantity and quality of the Houston-Miami service proposed by Continental. But the focus was on the Houston-Miami segment, even though the CAB traditionally views proposals for any particular segment not with tunnel vision but rather with a peripheral vision that takes into account the support (or diversion) ascribable to nearby service." Appendix A, pp. 12-13.

III. No Fundamental Issues of Administrative Law Are Presented by This Case.

In its petition to this Court, Delta for the first time asserts a newly discovered, and somewhat obscure, basis for review of the Board's decision. It suggests that some fundamental issue of administrative law is raised by the combined effect of (1) the Board commencing a new route case *sua sponte* and selecting specific route segments to be included, (2) the court's comments on "defensive" route applications, and (3) the Board's practice of dismissing stale applications. We will attempt to sort out Delta's confused claim of conglomerate error.

Delta does not appear to question the authority of the Board to commence a new route case *sua sponte,* rather than in response to an application, and to select the specific route segments to be considered. Instead, Delta asserts that when the Board does so "the right of airlines to submit responsive applications is absolutely

vital to a fair hearing and to the administration of the Federal Aviation Act." Petition, p. 17. Delta further observes that this is a point "to which the court did not address itself." *Id.* The court did not address itself to this matter because it was not raised in the instant case, and because "the right of airlines to submit responsive applications" has never been questioned. When a route proceeding is instituted by the Board, every carrier has a right to file applications for the routes at issue, as any number of carriers including Delta did in the instant case.

Moreover, the Board has uniformly received, as it did in this case, the comments of potential carrier applicants as to the proper scope of the proceeding, the routes to be included, and the restrictions to be imposed on any certificates granted as a result of the proceeding. What both the Board and the courts have denied is the right of a carrier, by a *non-responsive* application for routes which the Board determines should *not* be included, to force enlargement of the proceeding beyond manageable bounds. To the latter question both the Board and the court addressed themselves.

This was the basic issue considered by the court in *National Airlines* v. *CAB,* 129 U.S. App. D.C. 180, 392 F.2d 504 (1968), when Delta and National sought to expand the proceeding to permit them to apply for a number of additional smaller markets from which other applicants might derive backup traffic to support service in the monopoly markets of Delta and National. The court dismissed the appeal and stated:

> "Petitioners claim that the exclusion of San Antonio, Tucson and El Paso from any of the scheduled proceedings deprives them of *Ashbacker* rights because petitioners have applied for trans-

continental routes with intermediate stops at these excluded cities. American Airlines, for example, presently serves these excluded cities on routes extending from Houston and Dallas to the West Coast. By acquiring Miami-Houston and Dallas authority in Southern Tier, American would have a transcontinental route that would, say petitioners, economically exclude the applications petitioners have filed for similar authority.

"We think this situation is analogous to that in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board* [100 U.S. App. D.C. 184, 243 F.2d 607 (1957)]. There Northwest applied for Detroit-Miami rights which Eastern already had, and the Board scheduled this service for investigation. Eastern sought expansion of this hearing to include its application for Detroit-West Coast rights already held by Northwest. Eastern contended that this was required by *Ashbacker* since a grant to Northwest would *de facto* give it West Coast-Detroit-Miami rights, and that if Eastern were not then given an opportunity to attain the same transcontinental route by completing its missing segment, it could not as an economic matter justify a second carrier on that route. We held that Eastern could not, in the name of *Ashbacker,* extend a geographically limited investigation 'into a massive consideration of the whole of American air transportation.' [*Id.* at 186, 243 F.2d at 609]." 129 U.S. App. D.C. at 186, 392 F.2d at 510.

The court in *National* also observed: "Pre-existing route intricacies render it almost impossible for the Board to tailor its proceedings so as to equalize the advantages, and disadvantages, with which each applicant enters a comparative proceeding." 129 U.S. App. D.C. at 184, 392 F.2d at 508.

Both the foregoing comments by the court in *National* were quoted with approval by the court in the instant case, the court observing that, "It bears reiteration that the Board is not obliged to structure its proceedings so as to equalize the beyond market capabilities of all applicants to a route case." Appendix A, p. 10.

It was in this context that the Board first referred to "a defensive application." The Board's comment was as follows:

> "In addition, both the Board and the courts have long recognized that we are not obliged to tailor our proceedings so as to equalize the beyond-area capabilities of all applicants to a route case. While Delta does not dispute this settled doctrine its position here would undermine the principle and thereby endanger the Board's ability to control the scope of its own proceedings. Thus, in any case where one applicant possessed a significant route integration advantage permitting it to claim substantial beyond benefits, a competing carrier could simply file a defensive application for nonstop rights in the same beyond markets. The Board would then be forced to choose between a massive expansion of the scope of a proceeding, or if it chose not to expand it, to eliminate route integration and beyond benefits as a factor in its decision. The elimination of such back-up support traffic would also reduce the level of service possible in the primary markets at issue. We do not believe that such an interpretation of the *Ashbacker* doctrine is warranted." Order 73-2-89, February 23, 1973, pp. 15-16; S.J.A. 575-76; Appendix C, pp. 36-37.

The court in its opinion used "defensive route applications" in the same context. The court stated:

> "As already noted, pre-existing certificates do give an advantage to certain applicants for a new seg-

ment, but that is not inherently unfair. Nor can we open the door to an equalization approach that would encourage all kinds of defensive route applications. The Board must act realistically in terms of existing route identification and business patterns." Appendix A, p. 13.

The *Eastern* precedent is clearly applicable to the case at bar. In this case, Delta used three multi-stop transcontinental applications to blanket not only all of the routes at issue in the original *Southern Tier* case but also most of the cities served by other applicants in the proceeding.[6] Grant of any one of these applications would involve the creation of new route authority throughout Delta's entire system, which at that time embraced the Northeast to Florida and beyond Florida through the Southeast and Southwest to California. The only area of the country untouched by Delta's applications was the Northwest. Thus, inclusion of Delta's applications would have substantially expanded the proceeding.

In the remanded phase of this case, Delta sought to compare pieces of its excluded application with portions of Continental's routes west of Houston to support its *Ashbacker* claim.[7] Since Delta's original ap-

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[6] Delta filed three applications which it sought to have consolidated with the *Southern Tier* Case: Docket 18250, which added Phoenix to Delta's Route 24 stretching from New York throughout the Southeast and beyond to California; Docket 18253, which involved a new route from San Francisco and Los Angeles to Miami via Phoenix, Albuquerque, El Paso, Dallas, Huntsville, Atlanta and Tampa; and Docket 18348, which involved a new route from San Francisco and Los Angeles via Tampa, New Orleans, Houston, San Antonio, Dallas, Albuquerque, El Paso and Phoenix. See Petition of Delta Air Lines, Inc. For Stay of an Order of the Civil Aeronautics Board, No. 21374, November 6, 1967, pp. 7-8.

[7] See chart following p. 16 of Delta's Brief to the Court of Appeals, June 11, 1973.

plications were so broad in scope, Delta was able to select those pieces of its unrestricted applications which matched Continental's route structure and to advance an *Ashbacker* claim with respect to each piece. Delta's brief to the Court of Appeals, pp. 16-17. However, the court had already dealt with this kind of argument. In *Second Delta,* the court held that Eastern was not entitled to contemporaneous consideration of pieces of its application which it had alleged were identical to the route authority at issue:

> ". . . Eastern splits its unrestricted application into small sections and urges that the several sections must be compared with similarly segregated sections of other applications. We think the Board is not required to do this. Were the law otherwise, the Board would be burdened with a flood of applications and motions, . . . filed by airlines whenever a new route was proposed which served any point already served by the protesting line. Such a tangle would prevent the Board from performing its statutory duty of upholding the public interest by fostering a sound air transportation system." 107 U.S. App. D.C. at 187, 275 F.2d at 645.

If Delta's *Ashbacker* argument were to be accepted, either every case would be converted into a massive reconsideration of the U.S. air transportation system or the Board could not consider the benefits of beyond-segment traffic support in meeting the needs of the market at issue and providing added public service benefits. Either result would be a serious impairment of the Board's ability to protect the public interest.

Finally we turn to Delta's inference, raised for the first time in its petition, that its rights have been abridged by the Board's practice of dismissing stale

applications (Section 302.911 of the Board's Rules of Practice, 14 C.F.R. § 302.911), and the fact that Delta's "excluded applications" had been dismissed by the Board here.

Delta does not point out to the Court that subsection (c) of Section 302.911 provides as follows:

> "(c) *Right to refile.* Dismissal of applications pursuant to this section will be without prejudice to the right of the applicant at any time to file a new application seeking all or any part of the route authority requested by the application which has been dismissed. Such new application will be assigned a new docket number."

While any carrier has a right to reconsideration of such an order of dismissal, the common practice of the carriers is simply to refile those applications in which they have a present interest. Delta also fails to disclose that it did not refile the "excluded applications" on which it now predicates its *Ashbacker* claim.

The significance of this dismissal was urged below, not by Delta but by Continental, with Delta contending that the dismissal had no effect on its *Ashbacker* claim. In its brief to the Court of Appeals, Delta's only reference to the dismissal of its applications occurred at the end of a long footnote. In its brief to the Court of Appeals (p. 39), Continental pointed out that Delta had no pending application:

> "The application which Delta contends was denied comparative consideration was not even pending at the time of the remanded hearing of the Houston-Miami route. Delta's earlier applications were dismissed by the Board as 'stale' on September 21, 1970. Order 70-9-10; S.J.A. 452-53. That dismissal occurred five months before the Court's decision reversing and remanding the case. Delta

did not refile its applications, although it was personally served with the Board's order dismissing its application and had more than adequate opportunity to do so.[57] For that reason alone, Delta has waived any right to an *Ashbacker* claim.

[57] "Delta references this fact by footnote only and asserts without any rationale that dismissal of its application 'cannot destroy Delta's *Ashbacker* rights.' Brief, p. 27, fn. 2. Without an application pending, there can be no denial of a right of comparative hearing. Delta's abandonment of its application was consistent with its position in the original proceeding. The only aspect of the application that Delta had pursued was service via Dallas, not via Houston. It gained no new authority via Dallas, so it had every reason to abandon its application."

In a complete reversal of its position below, Delta now seeks to make a virtue of its own failure to refile its "excluded applications." The answer to this is that Delta was not prejudiced by the dismissal of these applications. As discussed in the final section of this argument, Delta was permitted to introduce evidence on its *Ashbacker* claim as though it had a pending application, and Delta's *Ashbacker* argument was considered *in extenso* on its merits by the administrative law judge in his initial decision, the Board in its decision, the Board in its order on reconsideration, and the Court of Appeals in its opinion. Delta's failure to show mutual exclusivity, like its failure to refile the applications, is its own responsibility, not a defect in the administrative process calling for this Court's correction.

IV. Delta Has Failed To Demonstrate Mutual Exclusivity as a Matter of Economic Fact.

Delta's petition wholly ignores the final defect in its *Ashbacker* argument: that it was given an opportunity to establish the factual basis for its claim of prejudice and failed to do so.

As noted heretofore, Delta's applications sought authority between California and Florida via numerous cities in the Southeast and Southwest. While the Board excluded portions of these applications from consideration in the original *Southern Tier* case, it afforded Delta an opportunity "to show that there is a mutual exclusivity which we have not foreseen." Order E-25720, September 21, 1967, at p. 3; S.J.A. 12.[8]

Delta did not even seek to show mutual exclusivity in regard to the Houston-Miami market. In the original phase of the *Southern Tier* case, Delta's *Ashbacker* exhibits consisted of a "specimen pattern of service" to be operated as a third California-Florida carrier. DL-200I-201I; J.A. 838, 839. The services proposed operated between Miami, on the one hand, and Los Angeles and San Francisco, on the other hand, via New Orleans, San Antonio, Dallas, El Paso, Albuquerque and Phoenix. All Miami services either originated or terminated in California, and flights serving El Paso, San Antonio, Albuquerque and Phoenix were routed either nonstop to Miami or over the Dallas or New Orleans gateways. *No service was shown via Houston.* Houston was not included in any of the routings. In fact, Delta concentrated its "exclusivity" argument on Atlanta. Its exhibit DL-200J (J.A. 857) focused entirely on the Atlanta-Albuquerque/El Paso/Phoenix markets. Delta received Atlanta-Phoenix authority via Dallas in the *Dallas-Phoenix* case, but lost Atlanta-Albuquerque authority when Texas International and Frontier were selected in the *Service to Albuquerque*

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[8] See also *National Airlines, Inc.* v. *CAB*, 129 U.S. App. D.C. at 187, 392 F.2d at 511.

Case, Order 69-7-136, July 24, 1969, to serve the Dallas-Albuquerque market.[9] No carrier received Atlanta-El Paso authority, nor would Continental receive such authority here.

In the remanded Houston-Miami Phase of *Southern Tier,* Delta offered no specimen schedules. Since only Houston was at issue as a gateway to Miami, there was no evidence as to how Delta would implement the authority which it claimed was mutually excluded. Delta's *Ashbacker* exhibits in the remanded phase were limited to a series of traffic projections to which it applied a test used by the Board in the *Gulf States-Midwest Points Service Investigation* (Order E-24202, September 19, 1966) to measure the desirability of certificating competitive nonstop service. DL-902-905; J.A. 928-31.[10] Based on this limited evidence, Judge Dapper properly found that Delta's application for nonstop authority "would not be precluded by an award to Continental." I.D., p. 64; S.J.A. 542.

Then, on brief to the Board, Delta attacked Judge Dapper's finding by asserting that nonstop and one-stop service are on a "competitive near-parity." Delta Brief to the Civil Aeronautics Board, p. 38; J.A. 393. However, none of Delta's evidence supports this claim. Nowhere in its exhibits did Delta attempt to show "competitive near-parity," since it was obviously preoccupied with competitive nonstop service. The Board thus correctly found that "Delta has not established that Continental's single-plane flights between Miami and San Antonio, El Paso and Phoenix and its own application for nonstop rights in each of these markets

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[9] Had Delta been selected, it could have operated Atlanta-Albuquerque service via Dallas.

[10] See ELP-821R, pp. 3-4; J.A. 974-5.

are mutually exclusive as a matter of law or economic fact." Order 73-2-89, pp. 14-15; S.J.A. 574-575; Appendix C, p. 36.

In its petition for reconsideration, Delta for the first time contended that Continental's one-stop services via Houston would mutually exclude Delta's application, since Delta's application sought *all* forms of authority, *i.e.,* non-stop, one-stop, two-stop, etc. Delta Petition for Reconsideration, p. 18; J.A. 566. While noting that this particular argument had been raised by Delta for the first time in seeking reconsideration, the Board nonetheless traced back through Delta's evidence in the remanded phase. The Board found that:

> "Specifically, the only evidentiary support in the remanded proceeding for Delta's claim of mutual exclusivity appears in exhibits DL-901-905. These exhibits simply show O&D and interline connecting traffic in the Miami-Albuquerque, Miami-El Paso, Miami-Phoenix, and Miami-San Antonio markets. The point of these exhibits is that traffic in these markets does not approach the 100 passenger a day 'standard' which was used by the Board in 1966 (*Gulf States-Midwest Points Service Investigation,* Order E-24202, September 19, 1966) as a benchmark for considering an award of competitive nonstop service; and, thus, that Continental's entry into the markets would preclude an award of competitive nonstop authority to Delta. However, to the extent that Delta now argues that Continental's operations would preclude—as an economic matter—other *one-stop* operations, its new contention is without record support because such an economic issue cannot be decided by considering only Miami-El Paso/Phoenix/Albuquerque/San Antonio traffic data alone, *i.e.,* without also examining intermediate traffic support (*e.g.,* Miami-New Orleans/Dallas and Dallas/New Or-

> leans-El Paso / Phoenix / Albuquerque / San Antonio) which would have been available to support Delta's flights. . . ." Order 73-5-22, pp. 6-7; S.J.A. 692-93; Appendix D, pp. 64-65.

Thus, unlike the situation presented in Part I of *Second Delta,* on which Delta relies in its argument here, this case involves no *prima facie* showing of mutual exclusivity. Indeed, an examination of the record reveals that Delta altogether failed to support its *Ashbacker* claim. As the Board found:

> "By limiting its evidentiary showing to a recital of traffic in the Miami-El Paso/Phoenix/San Antonio/Albuquerque markets, Delta has not established that Continental's operations would preclude Delta's proposed routings in the 'excluded' markets. Thus, there is no more basis for a finding of legal or actual exclusivity with respect to the one-stop services than for the non-stop operations. . . ." Order 73-5-22, p. 7; S.J.A. 693; Appendix D, pp. 65-66.

In *Second Delta,* the court admonished the Board for its failure to make findings to support its assertion of lack of mutual exclusivity. 107 U.S. App. D.C. at 183, 275 F.2d at 641. In this case, however, the Board made specific findings based on the evidence of record. Its conclusion that mutual exclusivity does not exist is fully supported by the record.

CONCLUSION

Delta's strained interpretation of the *Ashbacker* doctrine, the sole basis on which it seeks a writ of certiorari, has been considered and either explicitly or implicitly rejected eleven times—by the Board in scoping the original proceeding; by the Court of Appeals prior

to the first hearing; by the Administrative Law Judge in that hearing; by the Court of Appeals in reversing the award to Delta; by the Law Judge in the remanded proceedings; by the Board in its order making the award to Continental; by the Board in denying Delta's petition for reconsideration; by the Court of Appeals in affirming the Board's decision; again by that court in denying Delta's petition for rehearing; again by that court in refusing to stay its mandate; and by Mr. Chief Justice Burger in denying its motion to this Court for a stay of the mandate of the Court of Appeals.

Delta does not contend that the prior decisions of the United States Court of Appeals for the District of Columbia, on which that court relied in denying its *Ashbacker* claim, were wrongly decided, nor does Delta cite any opinions of other circuits or any prior decisions of this Court which the Court of Appeals has failed to follow. Rather, it asserts only that the Court of Appeals for the District of Columbia Circuit wrongly selected from its own precedents in deciding the instant case. That court has not only rejected Delta's argument; it is significant that no member of that court found sufficient merit in the argument even to request a vote on Delta's suggestion for rehearing in banc.

Not only does Delta present no conflict between the circuits and no conflict with the decision of this Court, it proffers to this Court no important or novel issue. The case involves the application of well established rules of law to well supported factual findings. There is no reasonable basis for this Court to grant review on writ of certiorari.

WHEREFORE, Continental respectfully prays that the Court deny the petition.

Respectfully submitted,

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May 11, 1974 *

* Corrected copy substituted on May 21, 1974.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1274

DELTA AIR LINES, INC.,
Petitioner

v.

CIVIL AERONAUTICS BOARD, *ET AL.*,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The City of El Paso, the El Paso Airport Board and the El Paso Chamber of Commerce (the El Paso Civic Interests) oppose the petition of Delta Air Lines, Inc. (Delta) for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals' judgment in this case was entered on October 23, 1973.

Petitioner's statements pertaining to the opinion below, grounds of jurisdiction of this Court and the statutes involved

are acceptable to Respondent. Accordingly, pursuant to rule 40(3) of this Court, Respondent's brief does not contain such statements.

QUESTION PRESENTED

Whether the Civil Aeronautics Board (Board) under the circumstances of the case violated the principles enunciated in the case of *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945), by refusing to consolidate or hear the applications of Delta, and then thereafter awarding the route in question to Continental Air Lines, Inc. (Continental)?

COUNTER STATEMENT OF THE CASE

This case comes to this Court as a result of an administrative decision by the Board which was subsequently upheld by the Court of Appeals for the District of Columbia Circuit. The proceeding at the administrative level was known as the *Southern Tier Competitive Nonstop Service Investigation (Houston-Miami Phase)*, Board Docket 18257 (*Southern Tier*). In that proceeding the Board awarded a Houston-Miami route to Continental.

Because of their interest in obtaining single carrier service to the southeast, the El Paso Civic Interests have participated as an intervenor in this case and its predecessor proceedings before the Board since 1967. After an analysis of the proposals of the carrier applicants, they have supported Continental as the air carrier best able to provide the competitive service needed on the Houston-Miami route.

The proceeding originally commenced in 1967 when the Board undertook an investigation regarding the need for competitive nonstop service in 18 major markets across the so called "Southern Tier" of the United States. At that time those markets were largely served by Delta and by National Airlines, Inc. (National). One of the markets in the investigation was the Houston-Miami route which was served exclusively by National.

In order to confine the investigation to "manageable proportions" and to focus on those markets where additional unrestricted authority might be justified, the Board decided to limit the scope of the proceeding to designated markets rather than commence an area proceeding. The Board also imposed a pretrial restriction to the effect that any award to a carrier not then authorized to serve the markets at issue would be in the form of a new segment instead of an addition to an existing segment.

Shortly thereafter Delta and other carriers moved to expand the scope of the case to include other markets. Specifically Delta requested, *inter alia*, consolidation of applications for (1) a new route from San Francisco and Los Angeles to Miami via intermediate points which included Phoenix, Albuquerque, El Paso, Dallas, Huntsville, Atlanta and Tampa and (2) another segment between the same west coast points and Miami via other cities including Phoenix, El Paso, Albuquerque, Dallas, San Antonio, Houston, New Orleans and Tampa.

The Board on September 21, 1967 denied these motions. The Board was convinced that a broadening of the scope of the proceeding would begin a "chain reaction" which could ultimately result in an overall investigation of the service needs of all of the southern tier of states which encompassed hundreds of markets. Thus, the Board refused to consolidate Delta's applications except insofar as they were already then included in the proceeding. The Board also rejected Delta's *Ashbacker* claim that a refusal to consolidate its applications would require the Board to impose single-plane restrictions on the operations of other applicants. The Board found that if such contentions were true then there would be no geographical limit to a proceeding. The Board noted that it could not enlarge the proceeding's scope just because certain carriers may have had more beyond-area traffic advantages than others in the segments under consideration. The Board recognized that differing route patterns afforded carriers varying advantages in the service they could offer in any proceedings and that it would be impractical to attempt to fashion one in which all were equal. The Board,

however, did not preclude Delta from submitting evidence which might establish a need for more or different restrictions or which might establish mutual exclusivity and indeed invited Delta to submit such evidence.

Thereafter in October of 1967 Delta together with National petitioned the United States Court of Appeals for the District of Columbia for review of the Board's order. The Court of Appeals dismissed the petition for lack of jurisdiction, *National Airlines v. Civil Aeronautics Board*, 392 F.2d 504 (D.C. Cir. 1968) observing that Delta's *Ashbacker* claims were similar to those advanced in *Eastern Airlines, Inc. v. Civil Aeronautics Board*, 243 F. 2d 607 (D.C. Cir. 1957). The Court noted that *Ashbacker* did not of necessity require the Board to enlarge a proceeding to include abutting segments or prohibit the Board from considering in a separate proceeding an area that bordered on, or lay wholly within, the area covered in another proceeding. Moreover, the Court distinguished the case before it from *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 275 F. 2d 632 (D.C. Cir. 1959), *cert. denied* 362 U.S. 969 (1960), (*Second Delta*).

The case was returned to the Board and after a full hearing the Board Examiner (now referred to as an Administrative Law Judge) selected Continental to provide the service which he found was necessary in the Houston-Miami market. All carrier applicants were considered upon the basis of their plans of operation. The Board Examiner concluded that Continental should be selected to provide competition in Houston-Miami since it could give the best public service in that market and would be able to provide first single-plane and single-carrier service through connection at Houston of its existing system with the Houston-Miami segment.

Delta argued that the mandate of *Ashbacker* had been violated because the Board had refused to consolidate *Southern Tier* with other cases particularly with Delta's applications to serve Albuquerque, San Antonio, El Paso and Phoenix. However, the examiner rejected such argument when he found that approval of Delta's contentions would result in investigation of 30 markets and additional beyond-segment markets. Moreover,

he found that at that time there was insufficient traffic to support a new authorization limited to the cities specifically noted above.

The Board selected Delta as the carrier to provide the required service in Houston-Miami (Order 69-7-135 dated July 25, 1969). However, with respect to Delta's *Ashbacker* claims regarding those applications which had been denied consolidation, the Board dismissed them finding that the award it made would not have the effect of precluding any of those applications.

Continental then sought review in the United States Court of Appeals for the District of Columbia of the Board's decision contending that the Board had failed to consider those factors which related to the greater public service benefits Continental could provide. The Court of Appeals agreed, set aside the award to Delta and remanded the case to the Board for further proceedings, *Continental Air Lines, Inc. v. Civil Aeronautics Board*, 443 F. 2d 745 (D.C. Cir. 1971). In remanding the case, the Court directed the Board to consider and evaluate all pertinent factors in comparing Delta and Continental for selection of the carrier to serve Houston-Miami.

On April 4, 1972 a full evidentiary hearing was commenced before a different Administrative Law Judge who thereafter issued his decision on July 21, 1972. Once again the carrier selected to serve the route was Continental. In reaching his decision the law judge carefully followed the instructions the Court of Appeals had set forth in its opinion. He thoroughly considered, *inter alia*, the service proposals of all applicants including Delta according to ten separate factors. He concluded his findings by stating that the carrier factors viewed on the whole clearly favored Continental's selection.

Once again Delta's *Ashbacker* contentions were considered and rejected. The law judge concluded that they lacked substantial merit and noted that the Board was not required to tailor each route proceeding so as to nullify the advantages one carrier had over another because of an existing route system. The Board, he stated, was under no judicial obligations to insure that Delta was on an equal basis with Continental in beyond-

area capabilities. The law judge evaluated Delta's *Ashbacker* arguments by examining the evidence of mutual exclusivity it had submitted at the hearing. He found that mutual exclusivity did not exist.

The Board on February 23, 1973 affirmed the law judge's decision, adopting his findings and conclusions as their own (Order 73-2-89) (App. C, p. 23).[1] The Board based its selection of Continental upon traditional carrier selection factors rather than upon industry balance considerations. Its choice of Continental was predicated primarily on the fact that Continental would bring greater service benefits than any other applicant to the primary market and offer superior beyond-area benefits as well (Order 73-2-89 at p. 5) (App. C, p. 28).

Once again Delta's *Ashbacker* claims were heard, considered and rejected. The Board found that Delta had not shown the markets in question to be mutually exclusive and that the Board was not required to tailor its proceedings so as to equalize the beyond-area capabilities of all applicants in a route case.

Delta petitioned for reconsideration of its *Ashbacker* contentions; however, the petition was rejected by the Board in its Order 73-5-22 dated May 4, 1973 (App. D, p. 59). In that order the Board noted that Delta's assertion of mutual exclusiveness between Continental's operations and Delta's one-stop authority (as opposed to nonstop authority) between Miami and the cities west of Houston was a new contention without record support. However, the Board found that *Ashbacker* did not require the Board to splinter an unrestricted application into sections and compare them with similarly segregated sections of other applications.

A petition for review of both Board orders was then filed by Delta with the United States Court of Appeals for the District of Columbia Circuit. On October 23, 1973 the Court of Appeals denied Delta's petition and affirmed the Board's decision relying upon its decision in the *National* case with

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[1] Citations herein to Delta's Appendix—"App."

respect to the *Ashbacker* arguments (App. A, p. 1). In direct reply to Delta's arguments the Court stated that contrary to what Delta claimed the Board's decision did not rely in dominant degree upon the beyond-area benefits to the "excluded points." The Court further stated that Delta's *Ashbacker* claims rested on the fallacy that Continental was selected for its ability to serve the needs of the excluded cities whereas it was actually selected upon evaluation of the Houston-Miami market and Continental's ability to serve it. The Court noted that it was not inherently unfair that pre-existing certificates give an advantage to certain applicants for a new segment and that if an equalization approach were opened submission of defensive route applications would be encouraged. In this respect, the Court felt that the Board had to act realistically in terms of existing route identification and business patterns.[2]

REASONS FOR DENYING THE WRIT

The principles set forth in the *Ashbacker* decision have been utilized and explicated in several decisions by the District of Columbia Circuit Court of Appeals involving airline route cases. In those cases the Court has carefully considered *Ashbacker* contentions and has handled them in a realistic manner perfectly consistent with the *Ashbacker* decision. The Court in the case at hand acted no differently and rendered a decision in accord with its previous decisions in similar cases and in accord with *Ashbacker* principles.

While Delta argues that the Court failed to give consideration to and overruled the "leading decision" in which *Ashbacker* rights were held violated, it will be seen herein that the Court did not need to make reference to *Second Delta* and did not overrule it. The Court, in our opinion, rendered its decision in accordance with the applicable legal precedents and did not violate the *Ashbacker* doctrine.

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[2]Delta later petitioned the Court for rehearing but that petition was denied (App. F, p. 81).

ARGUMENT

I.

THE DECISSION BELOW IS CONSISTENT WITH THOSE PRINCIPLESS ENUNCIATED IN THE ASHBACKER CASE

In its briief Delta argues that the decision of the Court of Appeals in affffirming the Board's selection of Continental to serve Houston-Miami unnecessarily abridged its *Ashbacker* right to file responnsive route applications and have hearings held thereon. Deltta additionally argues that there is no real difference betweeen the case herein and *Second Delta* and that therefore the Court's decision should have followed *Second Delta* in resultt. Since the Court did not reach the same decision as in *Seconnd Delta*, Delta claims that the Court thereby improperly overruled that case.

As will be shown herein, the Court's decision did not violate the *Ashbacker* doctrine, did not overrule *Second Delta* and was basedd upon Continental's ability to serve the market in question betteer than any other carrier.

A. The Awward to Continental of the Houston-Miami Route was Baseed Upon its Ability to Offer Total Service Benefits

In its bbrief Delta attempts to show that there is no distinction boetween *Second Delta* and the case herein since, as Delta claims, , both were decided upon the basis of beyond-area benefits. Delta makes reference to the Board's statement regarding its choice of Continental (petition at pp. 9 and 10) and asserts tthat beyond-area benefits was "the very factor" leading to Continental's selection. Delta's claims in these respects are sisimply not true.

In selecting Continental as the carrier to serve the route in question thee Administrative Law Judge after comparing all applicants inncluding Delta in ten separate categories, stated at page 58 of hiis decision that:

"The selection of carrier *factors*, viewed in the *aggregate*, clearly favor Continental. That carrier has a distinct and significant advantage in terms of beyond-area benefits, frequencies to be operated over the segment, and the proposed economy fare." (emphasis supplied)

Thus it is clear that the law judge did not select Continental upon the sole consideration of beyond-area benefits. Moreover, it is also true that the Board did not select Continental upoh "the very factor" of beyond-area benefits. On the very first page of its Opinion the Board stated that "we adopt his [Administrative Law Judge] findings and conclusions as our own." (Order 73-2-89) (App. C, p. 25). While Delta has quoted an isolated paragraph from the Board's opinion describing beyond-area benefits as being "the very factor" for Continental's selection, it has neglected to refer in any manner to other portions of the opinion wherein it is plainly demonstrated that beyond-area benefits was not the only factor considered and used in selecting Continental. For example, on page 5 of its Opinion the Board stated:

"Our choice of Continental for a Houston-Miami award is predicated primarily on the fact that it will bring *greater service benefits* than any other applicant to the primary market and offer superior beyond-area advantages as well. At the same time, we believe that Continental's proposal will not seriously harm any other carrier." (Order 73-2-89 at 5, App. C, p. 28) (emphasis supplied).

Thereafter the Board discussed why its choice changed from Delta to Continental offering many reasons. The Board concluded:

"For *all these reasons*, our choice of a Houston-Miami competitor, like Judge Dapper's, turns on the traditional carrier selection factors directly applicable to the market at issue rather than on wider industry balance considerations." (Order 73-2-89 at 7, App. C, p. 30) (emphasis supplied).

The Board then discussed and analyzed *six separate factors* in relation to Delta and other applicants after which it concluded that the public convenience and necessity required that Continental be selected.

The Court of Appeals in affirming the choice of Continental also recognized that selection of Continental was not based upon "the very factor" of beyond-area benefits when it stated at page 12 (App. A, pp. 12 and 18) of its Opinion that:

> "It suffices to say that the Board decision does not rest in dominant degree upon the beyond-area benefits to the 'excluded points'. That is to say, this is not a case where Continental had no advantage over the competing carriers in terms of Houston-Miami service, and was awarded the route because of the beyond-area benefits. The Board was primarily focused on service between Houston and Miami and did not, fairly speaking, convert this into an area case which turned on determination of the service to and from excluded points, or any determination of the need for such service or the carrier best qualified to give such service."

The Court below, while noting that the Board did give consideration to beyond-area benefits, found that such consideration was given for the purpose of "appraising the feasibility and realism" in Continental's proposal and in appraising the "quantity and quality" of Continental's service (App. A, p. 12). Thus the Court correctly concluded that:

> "... Delta's *Ashbacker* claim rests on the fallacy that Continental was selected for its ability to serve the needs of the excluded cities whereas it was actually selected upon evaluation of the Houston-Miami market, its need for service, and the kind of service in that market proferred by Continental, including the service made possible by Continental's backup support—four well spaced round trips daily at fare reductions, and all of the other items discussed above." (App. A, p. 13).

It is therefore clear that neither the Administrative Law Judge, the Board nor the Court of Appeals based its decision solely upon the factor of beyond-area benefits. Therefore, Delta's claim in this respect that its *Ashbacker* rights were violated must be dismissed.[3]

B. The Court of Appeals Decision Did Not Overrule Second Delta

Delta argues that the Court of Appeals' decision overruled the *Second Delta* case without any explanation since it did not mention *Second Delta*. That argument is premised upon Delta's assertions that the facts of *Second Delta* and the case herein were similar in terms of consideration of beyond-area benefits and that Continental's selection was based solely upon beyond-area considerations. It has already been shown that Continental's selection was based upon the total service benefits that it could bring to the Houston-Miami market and that beyond-area benefits was merely one of the many factors included in such. It will now be shown that while *Second Delta* was not mentioned in the Court's decision it was not necessary to do so.

Delta's reliance upon *Second Delta* as the controlling case herein is without any foundation and is erroneous. The Court in that case was dealing with a situation quite unlike the situation present in the case at hand. In that case the Court found an *Ashbacker* violation had occurred since the Board had selected Trans World Airlines, Inc. (TWA) to serve the St. Louis-Southeast route *solely* for the reason that TWA could provide transcontinental service between Florida and California, at a time when the California-Florida route was the subject of a pending investigation.

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[3] Delta would even have this Court believe that the Board should not have considered Continental's beyond-area benefits in making the carrier selection. In this connection it may be pointed out that the same Court of Appeals in *Frontier Airlines, Inc. v. Civil Aeronautics Board*, 259 F. 2d 808 (D.C. Cir. 1958) stated:

> "... it is sufficient to say that we think the needs of beyond area traffic may in many factual situations be a proper concern in the problem of establishing new air routes. In many situations we do not see how it could be otherwise." (259 F. 2d at 810).

> "The Board made clear that it selected TWA as the awardee of the new route because this selection would provide for the first time single-carrier, single-plane service between the Florida coast and the California coast." (275 F. 2d at 636).

There was no doubt of the Board's preoccupation with consideration of beyond-area traffic in awarding TWA the route for in its original opinion in the *St. Louis-Southeast Service Case*, 27 C.A.B. 342 (1958), the Board stated at page 350:

> "In view of the growing importance of the southeast area, both from an economic and a national defense standpoint, as well as the increasing volume of traffic exchanged between the Southeast and cities west of the Mississippi, we see no reason on the present record to deny the traveling public the additional single-plane frequencies that TWA will be able to offer . . ."

Thus, there was no question but that the Board had considered and had based its decision strictly upon beyond-area benefits so that transcontinental service between Florida and California could be established. This violated *Ashbacker* since at the time of the award to TWA, the petitioners had applications pending for through routes between Florida and California.

In the instant case there were no findings by the Board similar to those in *Second Delta* regarding beyond-area traffic and there were no bases for any similar findings.

It is submitted that in determining whether *Second Delta* was overruled by the Court's decision below, this Court ought to give consideration to the Court of Appeals' observation in *Second Delta* that consideration of beyond-area traffic insofar as it permits a carrier to generate more frequencies over the segment in question is

> ". . . certainly pertinent to the selection of a carrier to perform intra-area services found necessary because of service deficiencies within the area; such traffic may well,

as the Board found, be used to provide the base for proper traffic development within the area." (275 F. 2d at 642).

Delta's assertion that consideration of Continental's beyond-area traffic was improper pales in the face of the above when it is considered that the deficiency in the Houston-Miami market was insufficient nonstop service and that Continental's beyond-area traffic would enable Continental to provide more nonstop flights in the market than any other carrier including Delta.

II.

THE BOARD HAS DISCRETIONARY POWER TO LIMIT THE SCOPE OF AIR ROUTE INVESTIGATIONS IN APPROPRIATE SITUATIONS AND SUCH POWER DOES NOT VIOLATE THE HEARING PROVISIONS OF THE FEDERAL AVIATION ACT

Delta contends that the Court below stripped the *Ashbacker* doctrine of vitality in air route cases by accepting the Board's assertion that it could in its discretion disregard "defensive" route applications. This, says Delta, violates the hearing provisions of the Federal Aviation Act [§401(c)].[4] Delta further argues that the Board when it commences a new route proceeding *sua sponte* and selects the route segments to be competed for, must hold hearings on all responsive applications filed. In making those contentions Delta concedes at the same time that the Board must retain "considerable discretion in defining the scope of air route cases" (petition at 16). Delta's arguments, however, appear to ignore that very concession.

Contrary to what Delta infers, the Court below did not in any manner characterize Delta's excluded applications as "defensive" maneuvers to gain *Ashbacker* rights. Rather, the Court merely observed that if attempts were made to equalize the beyond-area benefits in route proceedings then unrestricted

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[4] 49 U.S.C. 1371(c)

"defensive" route applications would be unnecessarily encouraged. If that occurred then routine investigations of single markets could be turned into enormous investigations encompassing numerous markets. In such cases the Board would be faced with monumental problems with the likely result that route investigations would never be completed within reasonable time frames. The damage which such eventualities would cause to the traveling public and the air industry would be irreparable.

Delta's use of the term "responsive" applications would include "defensive" applications and thus would lead to the disasterous situations noted above. Quite obviously *Ashbacker* was never intended to be extended to the lengths which Delta seeks to extend it. The Court's decision below applied the *Ashbacker* doctrine in a reasonable and practical fashion without sapping it of its real meaning. Under Delta's interpretation the *Ashbacker* doctrine would be applied in an illogical and impractical fashion.

Despite Delta's contentions to the contrary, it is clear that its route applications were not rejected because they were "defensive" (although they may have been "defensive") but, rather, they were rejected because they did not comport with the limitations placed upon the *Southern Tier* investigation by the Board. Thus, the question resolves itself into whether or not the Board had the right to so limit the proceeding and reject Delta's applications while at the same time giving consideration to Continental's beyond-area benefits. It is submitted that the Board had such a right and did not abuse it in this case. In the context of all the facts the Court of Appeals agreed by upholding the Board's selection of Continental.

The Court below affirmed the Board's right to place reasonable restrictions upon the scope of route proceedings and affirmed the Board's right in selecting carriers for routes to give consideration to a carrier's existing routes within the context of a sensible interpretation of *Ashbacker* principles. The Court's decision in those respects did not represent a break with the *Ashbacker* doctrine or abridge Delta's rights pursuant to the hearing provision of the Federal Aviation Act. The principles of

Ashbacker do not require that the Board be made to choose between conducting a massive investigation and refusing to consider a route applicant's backup traffic.

The Board's action in limiting the scope of *Southern Tier* and in rejecting Delta's efforts to expand it is not without precedent. In the *Eastern* case, *supra*, the Court of Appeals recognized the discretionary power of the Board in limiting the scope of air route investigations and also recognized that "defensive" applications were not legitimate uses of the *Ashbacker* doctrine:

> "Despite Ashbacker it seems to us that the Board must have a measure of discretion in placing limits to the extent of a given proceeding. Certainly the Ashbacker doctrine is not available for *mere tactical maneuver purposes.* An existing certificate holder cannot by the mere filing of applications for routes transform a limited inquiry into a massive consideration of the whole of American air transportation. The problem is typically one for agency judgment. If the Board is not unreasonable in its limitation of a proceeding, the courts ought not to interfere, even if they have power to do so." (243 F. 2d at 609) (emphasis supplied).

The Court of Appeals in the *National* case, *supra* upheld the Board's decision to place geographical limitations on the proceedings and solidified its own holdings in the *Eastern* case by refusing to transform *Southern Tier* into a massive area investigation. The Court emphasized, as it had in *Eastern*, that the *Ashbacker* rule of a right to a comparative hearing was founded on practicalities and was a fluid right. The Court then stated:

> "While we adhere to the principle that 'the Board cannot, either intentionally or by the demonstrable effect of an order, avoid * * * the *Ashbacker* doctrine,' we reiterate that the Board must be free to *exercise a considerable measure of discretion in defining the scope of air route cases.*" (392 F. 2d at 508) (emphasis supplied).

The *Eastern* and *National* cases make it crystal clear that the Board may indeed, without violating *Ashbacker*, reject route applications which do not comply with the limitations reasonably placed on the scope of the air route under consideration. Those cases also make it clear that *Ashbacker* does not require the Board, as Delta would have this Court believe, to choose between being saddled with an expansion of a limited investigation into a massive investigation and being made to conduct an investigation without giving consideration to beyond-area benefits in selection of a carrier. As the Court in the *National* case stated:

> "Pre-existing route intricacies render it almost impossible for the Board to tailor its proceedings so as to equalize the advantages and disadvantages with which each applicant enters a comparative proceeding. The maturing and sophisticated route structure and development preclude a simplistic vindication of *Ashbacker* claims." (392 F. 2d at 508).

Acceptance of Delta's strained view of *Ashbacker* in the instant case would in effect require rejection of holdings in both the *Eastern* and *National* cases. There are, however, no cogent reasons as to why such precedents should be rejected or ignored in the instant case.

Delta's petition would have this Court apply *Ashbacker* in a mechanical fashion without regard to the realities and practicalities of air route proceedings. Inherent in such an application of *Ashbacker* would be curtailment of legitimate agency discretion and unfettered acceptance and approval of tactical maneuvering of "defensive applications." It is submitted that such an interpretation and application of *Ashbacker* is contrary to settled law.

In sum, the decision below does not abridge the right of carriers to file truly responsive applications in route cases but merely follows settled law in permitting the Board to reasonably restrict the scope of air route investigations.

CONCLUSION

The decision below follows the applicable precedents, preserves the Board's right to exercise reasonable discretion in limiting areas to be considered in air route proceedings, gives legitimate but not undue recognition to the beyond-area benefits without violating *Ashbacker*, and upholds selection of the carrier best able to serve the needs of the traveling public in the Houston-Miami market. Therefore, the decision below should not be reviewed by this Court and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1274

DELTA AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents*

BRIEF OPPOSING PETITION FOR CERTIORARI

Submitted by
THE CITY OF HOUSTON, TEXAS
and
THE HOUSTON CHAMBER OF COMMERCE

QUESTION PRESENTED

Whether the *Ashbacker* doctrine [1] of fair comparative hearing requires the Civil Aeronautics Board to define the scope of new route (licensing) proceedings

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[1] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945).

so as to equalize differences among the respective qualifications of competing applicants resulting from differences in their existing routes.

STATEMENT OF THE CASE

The *Southern Tier Competitive Nonstop Investigation* was instituted by the Civil Aeronautics Board (Board) in 1967 to determine the need for competitive airline service in 18 specified city-pair markets. These included the city-pair Houston-Miami but did not include city pairs made up of Miami or Houston, on the one hand, and Phoenix, Albuquerque, El Paso and San Antonio, on the other. The Board declined timely requests by a number of parties including Houston as well as petitioner Delta Air Lines, Inc. (Delta) to include the latter city pairs in the *Investigation.*

Continental throughout the *Investigation* held route authority between Houston, on the one hand, and Phoenix, Albuquerque, El Paso and San Antonio, on the other. Delta had no authority in any of these markets. During the proceedings it developed that this difference in the pre-existing authority of these carriers worked in favor of Continental and against Delta in the competition for a Houston-Miami award. The availability of Miami passengers from city sources west of Houston permitted Continental to propose greater Houston-Miami frequency using larger aircraft than could Delta, lacking access to such passengers. At the same time, Continental was able to offer Phoenix, Albuquerque, El Paso and San Antonio passengers the convenience of travel to and from Miami without changing planes—a benefit that Delta could not offer.

These differences led the Board to the selection of Continental over Delta for the Houston-Miami route. Delta urged below that *Ashbacker* required the Board to give Delta a simultaneous opportunity to seek authority to provide Phoenix, Albuquerque, El Paso and San Antonio-Miami service via Houston in order to give Delta a "fair" comparative hearing as against Continental. The Board and the Court below rejected Delta's argument. No new authority was at issue or awarded in these Houston-west markets either in the *Southern Tier* Case or any other contemporaneous proceedings.

ARGUMENT

I. THE QUESTION WHETHER THE ASHBACKER DOCTRINE OF FAIR COMPARATIVE HEARING IS APPLICABLE TO AIRLINE ROUTE CASES IS NOT IN THIS CASE.

Delta contends that the Court should grant certiorari to consider "Whether the *Ashbacker* doctrine of fair comparative hearing is applicable to airline route cases . . . ." Delta, Petition, p. 2. This would be an "important" question for this Court to consider if it were presented, but it is not. All Court decisions reviewing Civil Aeronautics Board orders, in every circuit, have held or assumed that the *Ashbacker* doctrine *does* apply. The Court below applied it, and applied it correctly, in the instant case.

There is thus no way in which this Court could reach the question as stated by Delta. In fact, the section of Delta's brief devoted to this question concedes that the answer is "established" in the courts of appeals (Delta, Petition, p. 14).

II. THE QUESTIONS OF ADMINISTRATIVE PROCEDURE WERE RESOLVED CORRECTLY, WITH DUE REGARD FOR A BALANCE BETWEEN PRIVATE RIGHTS AND THE FLEXIBILITY IN FASHIONING THE SCOPE OF ITS PROCEEDINGS ESSENTIAL TO AN AGENCY IN ORDER TO ACT IN THE PUBLIC INTEREST, AND IN ACCORDANCE WITH PRECEDENT.

This case does not present to this Court questions of the propriety of the Board's "staleness" rule (14 C.F.R. § 302.911) nor does it present a controversy over the speed or order with which the Board may dispose of matters on its docket. The Court below did not decide the case on such grounds.

Delta contended that the Board was required to consider new Houston-west authority for Delta allowing Delta to duplicate Miami services which Continental (the holder of Houston-west authority) could provide with an award of Houston-Miami authority. The Court held that the Board was not required to consolidate Delta's Houston-west applications. Delta argues that this holding constitutes an overruling *sub silentio* of *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 275 F.2d 632 (C.A.D.C.), cert. denied, 362 U.S. 969 *("Second Delta"),* a leading decision in the same circuit. The decision below accords, however, with an equally important leading decision, *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 243 F.2d 607 (C.A. D.C.), which Delta attempts to distinguish from the instant case (Delta, Petition, p. 19, n. 20).

The fact is that the decision below is not in conflict with *Second Delta* and is compelled and governed directly by *Eastern Air Lines.* In *Second Delta* the transcontinental route involved was placed at issue in one proceeding but awarded in another, different proceeding where it was expressly not at issue. In

Eastern Air Lines, and in the instant case, the authority sought by the applicants petitioning for judicial relief was as a matter of discretion *never* placed in issue or awarded to any carrier in any proceeding. In *Eastern Air Lines,* Eastern sought extension westward over the routes of Northwest. In the instant case, Delta sought extension west of Houston over Continental's routes. In each instance the Court below consistently held that the Board need not under *Ashbacker* place such extensions in issue.

Delta attempts to distinguish the instant case from *Eastern Air Lines, supra,* by the bald assertion that *Eastern Air Lines* involved an "area-type" proceeding, while the instant case involved "discrete markets" rather than an area. Delta does not allege, and cannot show, any lack of objectivity in the Board's selection of the "discrete" markets. The history of the proceeding demonstrates that they were selected on the basis of historic origin-destination and connecting traffic levels in a particular year, and the exclusion of certain Houston-west markets results from the fact that they were not as large at that time, in passenger volume, as the "discrete" markets selected. The Board's method was as objective a procedure for limiting scope as would have been selection of a geographic "area".

There is thus no intracircuit conflict buried in the decision below. Even if such conflict existed, it would not justify grant of the petition. Rather, any such conflict should be resolved by the Court below *en banc.* See *United States ex rel. Robinson* v. *Johnston,* 316 U.S. 649. If Delta were concerned that such a conflict existed, it should have sought rehearing *en banc* by the Court below.

CONCLUSION

The decision below is correct, was compelled by precedent, and presents no issues meriting review by this Honorable Court. The Court should therefore deny certiorari.

Respectfully submitted,

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Dated: May 11, 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1274

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINION BELOW

The opinions of the court of appeals (Pet. App. 16-18) and the Civil Aeronautics Board (Pet. App. 23-56, 59-73) are not yet reported.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 22) was entered on October 23, 1973. A petition for rehearing and suggestion for rehearing *en banc* were

[1] The initial decision of the administrative law judge was attached to the Board's opinion as an appendix, and was adopted by the Board except to the extent modified in its own opinion (Pet. App. 24-25). It has not been reproduced in the appendix to the petition.

547-928—74——1

denied by an order (not reproduced in the appendix to the petition) filed on November 20, 1973. The petition for a writ of certiorari was filed on February 19, 1974 (February 18 having been a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 49 U.S.C. 1486(f).

QUESTION PRESENTED

Whether, in selecting a carrier to provide new air services between Houston and Miami, the Civil Aeronautics Board was as a matter of law required by *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327, to afford comparative consideration to applications seeking authority to provide services between Miami and points west of Houston which were already being served by the successful applicant.

STATUTE INVOLVED

Sections 401 (a) and (c) of the Federal Aviation Act of 1958, 72 Stat. 754–755, as amended, 49 U.S.C. 1371 (a) and (c) are set forth at Pet, 2–3. Also involved is Section 401(d)(1), 49 U.S.C. 1371(d)(1).

STATEMENT

In 1967, the Civil Aeronautics Board instituted a new route proceeding to consider whether there was a need for additional nonstop air service between eighteen pairs of cities in the southern transcontinental tier of states, including Houston and Miami.[2] National Airlines was then the only carrier authorized to provide nonstop service between the latter city pair.

[2] All eighteen are listed at Pet. App. 8, n. 3.

Petitioner sought to expand the proceeding by consolidating it with petitioner's application for new California-Miami authority via numerous intermediate points, including Phoenix, Albuquerque, El Paso, San Antonio, Dallas, Houston, New Orleans, and Atlanta. This would have placed in issue the need for new service in many markets in addition to the eighteen markets whose needs the proceeding was instituted to consider.

Petitioner insisted that such expansion of the proceedings was required by *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327, where this Court held that one of two mutually exclusive applications for a radio license could not be granted without giving comparative consideration to both. Petitioner claims that the *Ashbacker* principle required consolidation because a carrier that obtained an extension of its routes to new cities could provide service between points on its existing routes and the new cities. Therefore, a rival of petitioner who obtained a Houston-Miami route could obtain the same authority that petitioner was seeking in its applications.[3]

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[3] As the court of appeals explained (Pet. App. 7), a carrier receiving new route authority may "tack"—or combine—its existing and new authority. For example, suppose that the Board institutes a proceeding to consider the need for new service from A to B, and one of the applicants already holds authority from B to C. If that carrier is awarded the new segment between A and B, it may, unless otherwise restricted, provide through service from A to C, so long as a stop is made at B, the segment junction point.

The Board rejected petitioner's demand for a broadened proceeding, stating that petitioner's interpretation of *Ashbacker* "'would start a chain reaction' transforming the proceeding into a * * * review of the needs of hundreds of markets in the southern tier states" (Pet. App. 9). The Board, however, invited petitioner to submit evidence in support of its contention that the award of Houston-Miami authority to another carrier would preclude the grant of petitioner's excluded applications. The court of appeals dismissed petitions for immediate review of that decision as premature. *National Airlines, Inc.* v. *Civil Aeronautics Board,* 392 F. 2d 504 (C.A.D.C.) (hereinafter *second National*). It concluded that the carrier's opportunity during the proceedings to show that in fact the grant of one application would require the denial of the other satisfied *Ashbacker.*

The Board subsequently awarded Houston-Miami authority to petitioner. The court of appeals set aside that award. *Continental Air Lines, Inc.* v. *Civil Aeronautics Board,* 443 F. 2d 745 (C.A.D.C.). After further evidentiary hearings on remand, the Board selected Continental Air Lines for the route. The Board's decision, based on a balancing of "traditional carrier selection factors" (Pet. App. 30), was "predicated primarily on the fact that * * * [Continental] will bring greater service benefits than any other applicant to the primary market [Houston-Miami] and offer superior beyond—area advantages as well" (Pet. App. 28). Specifically, it found (Pet. App. 30):

> Continental can offer a more extensive pattern of Houston-Miami nonstop frequencies—four daily round trips—than any other carrier. It can support this level of service because of its substantial pool of support traffic west of Houston. As a corollary, Continental would also provide greater beyond benefits than any other applicant, bringing first single-plane service to approximately 37,000 passengers in the Miami-Phoenix/Tucson/Midland/El Paso markets, and competitive one-stop flights to about 25,000 Miami-San Antonio passengers in 1973.

The Board rejected petitioner's contention that, having excluded its application for authority between Miami and points west-of-Houston, *Ashbacker* required the agency to restrict its award to Continental by requiring a change of plane at Houston on service between Miami and those points (Pet. App. 36–37):

> [B]oth the Board and the courts have long recognized that we are not obliged to tailor our proceedings so as to equalize the beyond-area capabilities of all applicants to a route case. While Delta does not dispute this settled doctrine its position here would undermine the principle and thereby endanger the Board's ability to control the scope of its own proceedings.

The Board also found that Continental service between west-of-Houston points and Miami will not in fact preclude the service proposed in petitioner's excluded applications. The Board adhered to this view in denying reconsideration (Pet. App. 59–73).

The court of appeals affirmed (Pet. App. 1–18). It explained (Pet. App. 13):

Delta's *Ashbacker* claim rests on the fallacy that Continental was selected for its ability to serve the needs of the excluded cities whereas it was actually selected upon evaluation of the Houston-Miami market, its need for service, and the kind of service in that market proffered by Continental, including the service made possible by Continental's backup support—for well spaced round trips daily at fare reductions, and all of the other items discussed above.

Delta was given the opportunity to make a showing of mutual exclusivity that *Ashbacker* contemplates. But that did not require putting its applications on an equal par with the backup service in fact available from Continental's existing traffic.

ARGUMENT

The decision of the court of appeals is correct, and the petition presents no issue warranting further review.

1. The decision below does not involve fundamental issues of law. The court of appeals did not question the applicability of the *Ashbacker* principle to new air route proceedings. The application of that principle to air route proceedings has resulted in a substantial body of law,[4] and the present case involves

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[4] *E.g.*, *Eastern Airlines, Inc.* v. *Civil Aeronautics Board*, 178 F. 2d 726 (C.A.D.C.); *Seaboard & W. Airlines, Inc.* v. *Civil Aeronautics Board*, 181 F. 2d 777 (C.A.D.C.); *Northwest Air-Lines, Inc.* v. *Civil Aeronautics Board*, 194 F. 2d 339 (C.A.D.C.); *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 228 F. 2d 17 (C.A.D.C.); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 243 F. 2d 607 (C.A.D.C.); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 247 F. 2d 562 (C.A.D.C.); *National Airlines, Inc.* v. *Civil Aeronautics Board*, 249 F. 2d 13

merely the application of settled principles to a particular factual situation.

2. As previously indicated (N. 3, p. 3, *supra*), a carrier receiving new route authority may, unless affirmatively restricted, "tack" the new authority to its preexisting route system. It may thus operate between the new points and points it already holds authority to serve—here Miami and the four points west of Houston, via a stop at Houston.[5] In selecting an applicant for the new route the Board normally considers the public benefits which may flow from such "route integration." The additional traffic to and from the "beyond points" may enable a carrier to provide more and better service than it otherwise could in the market whose needs are under consideration.[6] In addition, route integration may result in service benefits to passengers moving to or from "beyond points," and may affect the diversionary impact that a given award will have on other carriers operating in

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(C.A.D.C.); *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 275 F. 2d 632 (C.A.D.C.), certiorari denied, 362 U.S. 969; *National Airlines, Inc.* v. *Civil Aeronautics Board*, 392 F. 2d 504 (C.A.D.C.); *cf. Western Air Lines, Inc.* v. *Civil Aeronautics Board*, 184 F. 2d 545 (C.A. 9); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 271 F. 2d 752, 756–757 (C.A. 2), certiorari denied, 362 U.S. 970; *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*, 349 F. 2d 587 (C.A. 10).

[5] For example, in 1961, when Delta and National were awarded transcontinental authority, Continental was awarded a route between Los Angeles and Houston by way of Phoenix, El Paso and San Antonio (Pet. App. 4), and it would be authorized to tack its existing authority to serve the markets between Houston and those points to its new authority to serve the Houston-Miami market.

[6] See Opinion of the Board (Pet. App. 66–67).

the "beyond" markets (Houston-Phoenix route segment, for example).[7] It is settled that the Board's reliance on these considerations is entirely proper and "does not impinge upon the Ashbacker doctrine." *Frontier Airlines, Inc.* v. *Civil Aeronautics Board,* 259 F. 2d 808, 810 (C.A.D.C.)

The ability or inability of competing carriers to claim the benefit of these considerations in support of their applications in new route proceedings are the "advantages and disadvantages" which applicants bring to such proceedings by reason of their own "[p]reexisting route intricacies" (Pet. App. 10). *Ashbacker* does not oblige the Board to structure new route proceedings so as to equalize these advantages and disadvantages. *National Airlines, Inc.,* v. *Civil Aeronautics Board,* 249 F. 2d 13 (C.A.D.C.); *second National, supra.*

The practical effect of petitioner's argument, however, is to demand just such an "equalization of advantages and disadvantages" for all applicants. If petitioner's contention were accepted, in any route case in which one applicant had an advantage in ability to integrate the market at issue with its existing system, a competing applicant could nullify that advantage simply by filing a defensive application for authority to extend its routes to the same "beyond markets" from which the first carrier might be expected to derive traffic. Once such an application were filed, the Board, according to petitioner, would have only two choices. It could either consolidate the ap-

[7] See Opinion of the Board (Pet. App. 67–68).

plications and expand the scope of the proceedings or it could impose restrictions to prevent the first applicant from tacking the new route to its existing system. The court of appeals upheld the Board's refusal to follow the first alternative in this proceeding in *second National,* and upheld the decision to refrain from imposing tacking restrictions in the 1973 decision. ~~in the decision below.~~

The decision below is correct and, contrary to petitioner's assertions, does not conflict with the prior decision of the court of appeals in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 275 F.2d 632 (C.A.D.C.) (hereinafter *second Delta*).[8] In that case the court reversed the award of a St. Louis-Florida route to TWA because it concluded that the Board had improperly based the award on TWA's ability to provide Florida-California service. However, this does not mean that the Board can never make an award which will take account of or have some effect upon markets other than the market under consideration. The applicability of *second Delta* "depends on the considerations adduced by the Board in making its award." *Second National, supra,* 392 F. 2d at 510. In this case the court found that the award to Continental was based, not on its ability to serve the excluded cities, but "upon evaluation of the Houston-Miami market, its need for service, and the kind of service in that market proffered by Continental, including the service

[8] In any event the resolution of conflicts within the same circuit is not normally an appropriate function of certiorari jurisdiction. Cf. *Wisniewski* v. *United States,* 353 U.S. 901.

made possible by Continental's backup support" from traffic originating at cities west of Houston (Pet. App. 13).

3. Petitioner's contention that the Board's practice of dismissing "stale route applications" [9] prejudiced its right to a hearing has not been presented to the court of appeals and accordingly cannot be considered as a basis for certiorari. Cf. *Lawn* v. *United States,* 355 U.S. 339, 362–363, n. 16. In any event, the contention is unfounded. The Board did not rely upon the fact that petitioner's applications were technically no longer on file. It treated the applications as current for purposes of the Houston-Miami proceeding and found that the award to Continental would not, as a matter of economic fact, preclude their subsequent grant, a determination which the petition for certiorari does not challenge.[10]

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[9] Under Rule 911 of the Board's procedural regulations (14 C.F.R. 302.911), route applications more than three years old that have not been heard are dismissed without prejudice.

[10] Moreover, petitioner's argument begs the question, for it rests on the right to submit "responsive applications" (Pet. 17), *i.e.*, "applications for logically related and mutually exclusive routes" (Pet. 13). Petitioner's excluded applications were not responsive to the scope of the proceedings and, as indicated, were found not to be mutually exclusive in law or fact of the applications which did correspond to the scope of the proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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